(13)

Supreme Court, U.S.
FILED
AUG 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1503

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NANCY BETH CRUZAN, by her parents and co-guardians LESTER L. and JOYCE CRUZAN,
Petitioners,
v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents.
v.

THAD C. MCCANSE, Guardian *ad litem,*
Respondent.

BRIEF OF AMICI CURIAE, SSM HEALTH CARE SYSTEM, ST. JOSEPH HEALTH SYSTEM, MERCY HEALTH SERVICES, CATHOLIC HEALTH CORPORATION, REVEREND JAMES J. MCCARTNEY, OSA, Ph.D., REVEREND KEVIN O'ROURKE, O.P., J.C.D., and CENTER FOR HEALTH CARE ETHICS, ST. LOUIS UNIVERSITY MEDICAL CENTER.

J. JEROME MANSMANN
MELANIE DIPIETRO
SANDRA L. LANNIS
MANSMANN CINDRICH & TITUS
Twentieth Floor
Four Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 642-2000
Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. STATEMENT OF INTEREST	1
II. SUMMARY OF ARGUMENT	2
III. ARGUMENT	4
A. Introduction	4
B. An Ethical Analysis of the Issues in This Case Requires (I) Primacy of the Dignity and Sanctity of Human Life, (II) An Analysis of the Benefits and Burdens of Treatment to the Patient Only, (III) An Evaluation of the Use of Health Care Technologies and (IV) An Analysis of the Distinction Between Intended Effects and Unintended Though Foreseen Natural Consequences of Treatment Decisions	6
C. This Court Should Adopt the Sanctity of Life as the Standard for the State's Interest in Determining the Appropriateness of Withdrawal of Treatment in Limited Circumstances	14

Page

D. This Case does not Involve the Decision Making Rights of the Patient to Terminate Treatment Arising out of The United States Constitution but Involves Standards by Which the Immediate Family or a Guardian may Make Decisions With Respect to Withdrawal of Surgically Implanted Means of Nutrition and Hydration 17

E. The Court Should Enunciate Guidelines for Making the Decision and for Courts to Apply if the Parties are not Able to Agree on the Appropriateness of a Treatment Decision for a Person in a Persistent Vegetative State .. 21

IV. CONCLUSION 25

TABLE OF AUTHORITIES

Cases — Page

Addington v. Texas, 441 U.S. 418 (1979) 22

Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 497 N.E.2d 626 (1986) 16

Conservatorship of Drabek, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (1988) 21

Conservatorship of Torres, 357 N.W. 2d 332 (Minn. 1984) 21

Cruzan, By Cruzan v. Harmon 760 S.W. 2d 408, (Mo. 1988) 15

Eichner v. Dillon, 73 A.D. 2d 431. 426 N.Y.S.2d 517 (1980) 15

John F. Kennedy Memorial Hosp., Inc., v. Bludworth, 452 So.2d 921 (Fla. 1984) 21

Leach v. Akron General Medical Center, 68 Ohio Misc. 1, 426 N.E. 2d 809 (1980) 22

In re: L.H.R., 253 Ga. 439, 321 S.E. 2d 716 (1984) 21

In re: Storar, 52 N.Y.2d. 363, 438 N.Y.S.2d. 266, 420 N.E. 2d 64 (1981) 15

Martinez v. State of California, 444 U.S. 277 (1980) 13

Matter of Conroy, 98 N.J. 321, 486 A.2d 1209 (1985) 15

Matter of Guardianship of Hamlin, 102 Wash.2d 810, 689 P. 2d 1372, (1984) 19

Powell v. Alabama, 287 U.S. 45 (1932) 5

Rasmussen By Mitchell v. Fleming, 154 Ariz. 207, 741 P. 2d 674 (1987) 21

Rivera v. Minnich, 483 U.S. 574 (1987) 23

Santosky II v. Kramer, 455 U.S. 745 (1982) 23

CASES — Page

Schneiderman v. United States, 320 U.S. 118 (1943) 23

Screws v. United States, 325 U.S. 91 (1945) 4

Severns v. Wilmington Medical Center; Inc., 425 A.2d 156 (Del. Ch. 1980) 21

Superintendent of Belcher-Town State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) 15

Williams v. Georgia, 349 U.S. 375 (1955) 5

STATUTES

Nev. Rev. Stat. §159.061 (Michie 1969) 19

N.J. Stat. Ann. §3A:6-36 (West 1968) 19

PUBLICATIONS

Ashley and O'Rourke, *Health Care Ethics: A Theological Analysis*, (1982) 9

Bellah, *Habits of the Heart, Individualism and Commitment in American Life*, (1985) 9

Beuchamp and Childress, *Principles of Biomedical Ethics*, (2nd Ed., 1983) 12

Childress, *Practices in Biomedical Ethics*, (1981) 9

Cranford, "The Persistent Vegetative State: The Medical Realty (Getting the Facts Straight)," *Hastings Center Report*, (1988) 14

Finnis, John, *Natural Law and Natural Rights*, (1980) 7

Gibson, Jr., M.D. "How Shall I Keep My Brother or Sister? Assisted Suicide versus Permitted Death: An Ethical Framework for Health Care Personnel, "*Human Life and Health Care Ethics*, (1985) 9

PUBLICATIONS — Page

"Gaudium et Spes," Vatican Council II: The Conciliar and Post Conciliar Documents, (Flannery, Trans. 1975) 3

Gustafson, James, "Monogolism, Parental Desires, and the Right to Life," *Perspectives in Biology and Medicine*, (1973) 7

H.L.A. Hart, *Law, Liberty and Morality*, (1962) 8

Kent, II *Commentaries on American Law*, (1826) 18

Lord Devlin, *The Enforcement of Morals*, (1874) 8

Lynn, M.D., Joann, *By No Extraordinary Means: The Choice to Forego Life—Sustaining Food and Water*, (1986) 7

McCormick, Richard, "To Save or Let Die: The Dilemma of Modern Medicine," *How Brave a New World? Dilemmas in Bioethics*, (1981) ... 9

O'Donnell, Thomas, *Morals in Medicine*, (1957) 9

O'Rourke, K., D. Brodeur, *Medical Ethics: Common Ground for Understanding*, (1987) 7

Orville, Griese, *Catholic Identity in Health Care: Principles and Practice*, (1987) 12

Pius XII, "Prolongation of Life: Allocution to an International Congress of Anesthesiologists", *The Pope Speaks*, (November, 1957) 12

President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life Sustaining Treatment*, (1985) 9

PUBLICATIONS — Page

The Congregation for the Doctrine of the Faith, *Declaration of Euthanasia*, (1980) 10

OTHER AUTHORITIES

65 A.L.R. 3d 991 (1973) 19

I. STATEMENT OF INTEREST

The SSM Health Care System is a Catholic health care system sponsored by the Franciscan Sisters of Mary and has its principal offices in St. Louis, Missouri. It is the largest health care provider in Missouri. In addition, it has facilities in Illinois, South Carolina, Oklahoma and Wisconsin, all together totaling fifteen acute care and three long-term care facilities.[1]

It is joined in this brief by St. Joseph Health System, Orange, California; Mercy Health Services, Farmington Hills, Michigan; Catholic Health Corporation, Omaha, Nebraska; Reverend James J. McCartney, OSA, Ph.D.; Reverend Kevin O'Rourke, O.P., J.C.D.; and the Center for Health Care Ethics, St. Louis University Medical Center, St. Louis, Missouri.[2] The St. Joseph Health System operates eight facilities in California and Texas. Mercy Health Services is a large health care system operating thirty-seven health care facilities in Indiana, Iowa and Michigan. The Catholic Health Corporation owns, manages or is affiliated with seventy-two health care facilities in fourteen states. Reverend McCartney is an ethics consultant for a Catholic hospital system in Florida. The Center for Health Care Ethics, headed by Reverend Kevin O'Rourke, addresses medical-ethical issues confronting health care professionsals.

---

[1] All parties have consented to the filing of this brief. Consents are on file with the Court.

[2] Although the *amici* are Catholic institutions and individuals, they are not the official teaching authority (Magisterium) of the Roman Catholic Church. As of the filing of this brief, the Magisterium has not issued an authoritative statement on the application of Catholic ethical and theological principles to the issues raised in this case.

The interest of the *amici* in presenting this *amicus* brief is twofold. First, as health care providers or consultants to such providers, the *amici* are concerned that the legal guidelines established by this Court in the case *sub judice*, reflect sound ethical principles.

Second, the *amici* are concerned that this Court's ruling protect the rights of family members, friends and, if necessary, court appointed guardians and health care providers so that they are able to act consistently with their ethical values and traditions and those of the patient.

Since the primary interest of the *amici* is that of encouraging that ethical principles be considered in this Court's legal analysis, this brief will not present an in-depth legal analysis of the issues presented on appeal to this Court. Rather, the legal issues briefed here are those that these *amici* deem to have significant ethical dimensions. Consequently, this brief will be limited to a presentation of basic ethical principles that are relevant to the identification of the state's interest in preserving life; the determination of who may make a decision for a person incapable of self-determination; and to the procedural and substantive standards that should be followed by decision makers in fact situations similar to the one before this Court. Finally, unlike the earlier *amicus* brief filed in this case before the Missouri Supreme Court by the SSM Health Care System, these *amici* will not advocate for either the petitioner or the respondent.

II. SUMMARY OF ARGUMENT

The constitutional principle that life must be protected, and no person's right to life abrogated without due process of law requires substantive rules designed to protect life to which family and friends, and, only if necessary, a legally appointed guardian, must adhere in

making treatment decisions for a person determined to be incapable of making his/her own decisions.

The paramount ethical principle applicable to decision making in cessation of treatment situations and specifically to the issues of this case is that the dignity and sanctity of human life in all of its forms must be valued and respected. An ethical analysis that protects the dignity and sanctity of life focuses on a review of the benefits and burdens of the treatment to the "human person fully considered."[3]

The various critical factors which impact on decisions as to the implementation, continuation or cessation of treatment for those in a persistent vegetative state include but are not limited to: (i) a requirement of a high degree of medical certainty of the medical diagnosis and prognosis of an amented state which constitutes an irreversible loss of all functions of consciousness, (ii) an analysis of the benefits/burdens which the treatment at issue offers to the patient, (iii) a consideration of the expressed views of the patient, if available and if temporally and substantively relevant to the issue of withdrawal of treatment and (iv) for patients who have never had sufficient mental capacity to express their views on the subject, or who have never adequately expressed their views, special care that their interests not be discounted as a result of such circumstance. The family, friends or court appointed guardian's decision making process should be characterized by a rigorous and comprehensive objective and subjective analysis of these factors.

These decisions should be made primarily by family and friends assisted by appropriate spiritual, medical,

---

[3] "Gaudium et Spes," *Vatican Council II: The Conciliar and Post Conciliar Documents*, 934-935, (Flannery, trans, 1975).

ethical and legal experts. If a court proceeding becomes necessary, this Court should establish that procedural standards require a legal presumption in favor of treatment and that the highest civil standard of proof apply. When a participant in the decision making process or any other interested person believes that the patient's rights are not being protected, the state courts are the proper forum to decide whether the decision has met the required standards.

III. ARGUMENT

A. Introduction

The constitutional issue raised by this case is a narrow one. This case does not involve either the liberty or the property interests of Nancy Beth Cruzan. It involves simply the painful decision of whether to leave intact or to remove her surgically implanted food and hydration tube. Ms. Cruzan appears to be irreversibly incapable of exercising any personal decision making. Thus, her liberty or freedom interests are not involved. Briefly stated, the issue is what does the Fourteenth Amendment require to protect life? This Court has recognized "the right which comprehends all others, [is] the right to life itself," Rutledge, J. concurring in *Screws v. United States*, 325 U.S. 91, 133 (1945).

These *amici* would suggest that the fundamental nature of the right to life recognized in the language of the Fourteenth Amendment requires two things. First, as a substantive matter where the state or those authorized by the state make a decision with respect to the nature and extent of treatment, its continuation or its cessation involving a person unable to make decisions, the standards for making such judgment must be designed to protect life. Second, there must be assurance of a fair hearing on such issues whenever an interested

party wishes to seek review of a decision affecting the life of a person in the position of Nancy Beth Cruzan.

Implicit in this Court's discussion of procedural and evidentiary standards in capital cases has been a recognition of the safeguards which due process requires. "That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and noncapital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." *Williams v. Georgia*, 349 U.S. 375, 391 (1955). This Court emphasized that this distinction is appropriate because "above all . . . they [the defendants] stood in deadly peril of their lives . . ." and therefore, it required the appointment of counsel and due process of law. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

Though this is not a capital case, it is an extraordinary situation. Consequently, it demands extraordinary attention to the interrelationship between the disciplines of ethics and law. The interrelationship between the disciplines is long standing because both have evolved from religious traditions to become independent bodies of knowledge and practice. Every decision to withdraw a patient's treatment involves ethical and legal dimensions. These *amici* are relying in part on Catholic and other religious writers in developing the ethical arguments presented herein. In so doing they are invoking traditions which are part of the common tradition of our people. However, it should be noted that much of the ethical literature cited herein is from writers who do not write from a religious perspective. Consequently, consideration of the ethical principles does not involve the establishment or advancement of religion.

To assist this Court's deliberation concerning the formulation of the substantive and procedural standards required by the Constitution; and to assure that the applicable ethical and legal principles are in concert and not in conflict, these *amici* offer the ethical and legal analysis which follows in this brief.

B. AN ETHICAL ANALYSIS OF THE ISSUES IN THIS CASE REQUIRES (I) PRIMACY OF THE DIGNITY AND SANCTITY OF HUMAN LIFE, (II) AN ANALYSIS OF THE BENEFITS AND BURDENS OF TREATMENT FOR THE PATIENT ONLY, (III) AN EVALUATION OF THE USE OF HEALTH CARE TECHNOLOGIES AND (IV) AN ANALYSIS OF THE DISTINCTION BETWEEN INTENDED EFFECTS AND UNINTENDED THOUGH FORESEEN NATURAL CONSEQUENCES OF TREATMENT DECISIONS.

While this Court's decision will be based upon the narrow facts of this case, such facts raise complex ethical, medical, spiritual and social considerations with an impact far beyond the interests of the litigants in this action. Though the legal issue before the court concerns the constraints that the Constitution may impose on a guardian's decision whether in this case to withdraw a surgically implanted artificial nutrition and hydration tube from an individual who has been diagnosed as in a persistent vegetative state, the ethical concern is primarily in a proper identification of the values to be protected and the factors to be determined in making the decision and finally in the proper identification of the appropriate decision maker.

Before presenting the relevant ethical considerations, it may be helpful to identify distinctions between an ethical focus and a legal focus. First, the adversarial nature of legal advocacy sometimes tends to absolutize rights, creating the prevalence of one "right" over another. From an ethical perspective, both religious and secular, human persons do not have an absolute right or dominion over life and death.[4] Individuals and the community are only stewards of life. Even for those persons who claim no religious roots, stewardship is an accepted principle because every person's own human life has a meaning and purpose that is so distinctive it must not be directly attacked, threatened, or diminished. Given the complex task of sorting out all of the considerations involved in the questions of the withdrawal of feeding tubes, the assertion of absolute positions threatens the ethical analysis of the issues.[5]

Second, a legal resolution of the facts before the Court may focus only on proscribing or permitting certain acts. The ethical interest is not only in what acts are proscribed or permissible, but in the explicit and implicit value statements and rationales legally validated by the specific resolution of the controversy before the Court, especially when it concerns the fundamentals of human life.

Every time a legal precedent is applied authoritatively in subsequent factual situations, socialization is occurring and some ethic of life is being popularized. Whether or not it is legally permissible to withdraw

---

[4] John Finnis, *Natural Law and Natural Rights, 22-31 (1980); Orville Griese, Catholic Identity in Health Care: Principles and Practice*, 105-108, (1987); James Gustafson, "Mongolism, Parental Desires, and the Right to Life," in 16 *Perspectives in Biology and Medicine* 529-557, (1973); President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life Sustaning Treatment*, 184-185, (1985); K. O'Rourke, D. Brodeur, *Medical Ethics: Common Ground for Understanding*, 73-76, (1987).

[5] Joann Lynn, M.D., ed., *By No Extraordinary Means: The Choice to Forego Life—Sustaining Food and Water*, 47-131, (1986).

artifically implanted nutrition and hydration is not the only concern. It is equally necessary that a sound and consistent ethic of life be reinforced as the recognized social morality. In Lord Devlin's words, "a recognized morality is as necessary to society's existence as a recognized government."[6] A "shared morality is the cement of society."[7]

Finally, the *amici* set forth their arguments within the specific facts of the case before the Court which addresses a person diagnosed as in a persistent vegetative state. However, the ethical principles and considerations set forth are relevant to any treatment decision.

There is a long tradition of the Judeo-Christian community addressing the ethical and moral concerns of society and of the professions. Central to this tradition is the well being of the human person fully considered.[8] This fundamental principle requires that those undertaking an ethical analysis focus upon the physical, psychological, spiritual, and social dimension of the person, asking how a particular social structure, act, or omission promotes or destroys the person and/or the community which is necessary for each individual to realize his or her human potential.

(i) Primacy of the Dignity and Sanctity of Human Life

Relevant fundamental principles[9] follow. Each person is sacred and should be treated as such. Life has a

[6] H.L.A. Hart, Law, Liberty and Morality, 48 (1962) *quoting* Lord Devlin, *The Enforcement of Morals*, 13-14 (2d ed., 1874).

[7] H.L.A. Hart, *Law, Liberty and Morality*, 48 (1962).

[8] *See* note 3, *supra*.

[9] Beuchamp and Childress, *Principles of Biomedical Ethics*, 90-93; 113-125 (2nd Ed., 1983); Childress, *Practices in Biomedical*

transcendent value which requires each person to nurture and support life. Negatively, no one has the right to intentionally harm or destroy life—not one's own, nor that of another. Proscriptions against murder, euthanasia and assisting suicide generally follow from such observations. Finally, because each person is social by nature, the communal aspect of life must be nurtured and constructed to support the dignity and value of each person.[10]

An ethical analysis exalting the sanctity of life seeks to avoid two extremes which are not a part of the mainstream of the Judeo-Christian ethical foundation: 1) an assertion of an absolute value in the maintenance of biological life regardless of other human values; 2) an assertion that disregards the importance of physcial life altogether. The ethical concern is to avoid both undertreatment, especially of the disabled or unprotected, and overtreatment of the dying.[11] It is suggested that the legal standard should not require either extreme.

Ethics, 34-50, (1981); President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, 60-89, (U.S. Government Printing Office, 1985); Ashley and O'Rourke, *Health Care Ethics: A Theological Analysis*, 187-191, 375-389, (1982).

[10] Bellah, *Habits of the Heart, Individualism and Commitment in American Life*, 252-256, (1985).

[11] Richard McCormick, "To Save or Let Die: The Dilemma of Modern Medicine," *How Brave a New World? Dilemmas in Bioethics*, 339-351, (1981); Thomas O'Donnell, *Morals in Medicine*, (1957); Count Gibson, Jr., M.D., "How Shall I Keep My Brother or Sister? Assisted Suicide versus Permitted Death: An Ethical Framework for Health Care Personnel," *Human Life and Health Care Ethics*, 240-249, (1985).

(ii) An Analysis of the Benefits and Burdens of Treatment for the Patient Only

A second consideration is traditionally referred to as the benefits/burdens analysis.[12] The inviolability of life is best protected by an analysis of the benefits and burdens of the treatment to the patient. Neither benefits nor burdens stand in isolation. The benefit/burden analysis focuses on the person and on the relationship between the degree of benefit and the degree of the burden the treatment causes for the patient.

Considerations of benefit include, but are not limited to, determinations of the value of the treatment in restoring the patient, in improving his/her condition and in reversing the underlying condition. Burden includes, but is not limited to, consideration of the invasiveness and permanency of the treatment in relationship to the potential for benefit to the patient.

A benefit/burden analysis depends upon a finding, with a high degree of medical certainty, of a medical diagnosis and prognosis and of the efficacy of the treatment for the patient. This analysis of the burdens and benefits imposed on the person by the treatment, is considered within a knowledge of the values and, if known, the expressed wishes of the patient.

The moral focus is, and we urge that the legal standard should be, the benefit that the patient gains from the treatment. The legal presumption should require the provision of life sustaining treatment. This presumption can be overridden only when one has an

[12] *See*, *Deciding to Forego Life-Sustaining Treatment*, note 4, *supra*, at 126-146; Griese, note 4, *supra*, at 159-163; The Congregation for the Doctrine of the Faith, *Declaration on Euthanasia*, (1980), as quoted in *Deciding to Forego Life-Sustaining Treatment*, note 4, *supra*, at 305-307.

adequate objective basis to show that such treatment would be futile or unduly burdensome to the patient. Burdensomeness to the patient results in a finding that the burdens of the treatment outweigh the benefits of the treatment for the patient or that the benefits of treatment are minimal or nonexistent.

(iii) An Evaluation of the Use of Health Care Technologies

Third, ethical analysis evaluates the use of technology. The ease with which a technology can be used does not change the medical reality for the patient. Physical life is a prerequisite to realization of the transcendent purpose of life. Physical life is a benefit. So, too, is the provision of comfort and care.

The ability, however, to prolong technologically only one dimension of human life—namely the physiological existence of the person—does not necessarily reflect a moral tradition that considers the human person from a total perspective. The ethical use of technological interventions should include protection of the sanctity and dignity of the human person fully considered.

The presumption that medical treatment is given to preserve and promote life is overcome when treatment becomes "extraordinary."

> Normally one is held to use only ordinary means—according to the circumstances of person, places, time, and cultures—that is to say, means that do not involve any grave burdens for oneself or another. A more strict obligation would be too burdensome for most men and would render the attainment of a higher, more important good too

difficult. Life, health, all temporal activities are in fact subordinated to spiritual ends.[13]

Only after these factors have been considered in the factual context of the patient can one decide whether life is being nurtured and protected, or whether the treatment in question can be withheld or withdrawn.

(iv) An Analysis of the Distinction Between Intended Effects and Unintended Though Foreseen Natural Consequences of Treatment Decisions

A fourth consideration concerns the intention of the actor.[14] Ethical analysis carefully distinguishes between the direct intention to cause death, on the one hand, and allowing death to occur as a foreseen but unintended side effect from an intentional act or omission on the other hand. This is a subtle but substantive distinction, and the use of this principle requires straightforward scrutiny and honesty concerning the intent and objective of the act.

Intention is a critical criterion that should be determined in cessation of treatment decisions. In the case of allowing a person to die, it is true that the patient usually dies upon removal of the life prolonging mechanism or therapy. The operative cause of death must be the existing pathology which now is allowed to run its natural course. If the medical diagnosis and prognosis

---

[13] Pius XII, "Prolongation of Life: Allocution to an International Congress of Anesthesiologists", *The Pope Speaks*, 4: 393-398 (November, 1957).

[14] Ashley & O'Rourke, *Health Care Ethics*, note 9, *supra*, at 187-191; Beauchamp & Childress, *Principles of Bioethics*, note 9, *supra*, at 113-115; *Deciding to Forego Life Sustaining Treatment*, note 4, *supra*, at 77-82; Orville Griese, *supra* note 4, at 248-254.

support the finding that the withdrawal of the medical treatment allows an underlying pathology to run its course, the fatal pathology is the cause of death, not the withdrawal of a life prolonging technology.[15]

Allowing a foreseen but unintended side effect to occur is very distinguishable from an act of mercy killing or euthanasia ("an act or omission which of itself or by intention causes death in order that all suffering may in this way be eliminated").[16] The motivation and intent of mercy killing is, at least implicitly if not explicitly, an exercise of complete dominion over life perceived as a private right of the individual devoid of any consciousness for the sanctity of life or for its communitarian significance. Mercy killing is precluded by the ethical analysis set forth above.

In this medical context, where there is the possibility of giving legal sanction to acts the intent of which is euthanasia or to rationales that undercut the sanctity of life, it is important that society enforce rules that support sanctity of life and protect against an elastic use of principles. A safeguard to this possible abuse is to require a high degree of certitude and corroboration in the medical diagnosis, in the benefit/burden analysis for the patient, in the evaluation of the technology and in the determination of the operative intent of the actors.

Any ethical decision in the context of medical treatment is very fact specific. Persons who are impaired or debilitated physiologically, psychologically, cognitively, or emotionally are to be distinguished from those

---

[15] A similar analysis of causation and intention is found in this Court's decision in *Martinez v. State of California*, 444 U.S. 277 (1980).

[16] *Declaration on Euthanasia*, as quoted in *Deciding to Forego Life Sustaining Treatment*, note 4, *supra*, at 303.

who are in an amented state[17] which constitutes the loss of all functions of consciousness. The ethical and human dimensions of such decisions are not easily translated into legal formulae. Further risks occur when a legal precedent is used by analogy within value systems not necessarily consonant with the values expressed or assumed in the ethical formulation of principle.

It is, therefore, critically important that the choice of terms that become legal standards be selected for their connotative value as well as their denotative meaning. Further, appropriate guidelines should be developed concerning the type of facts to be found and the presumptions and burdens of proof that are necessary to protect against the misuse of principles that would jeopardize the protection of life.

C. This Court Should Adopt the Sanctity of Life as the Standard for the State's Interest in Determining the Appropriateness of Withdrawal of Treatment in Limited Circumstances.

In defining the state's legitimate interest in the issue of whether surgically implanted artificial nutrition and hydration may be withdrawn from a person in a permanent vegetative state, the Supreme Court of Missouri was correct in adopting the sanctity of life as the guiding legal standard. As that Court noted:

> The state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality.

---

[17] Cranford, "The Persistent Vegetative State: The Medical Reality (Getting the Facts Straight)," 18 *Hastings Center Report*, no. 1, 27-32 (1988); *Deciding to Forego Life-Sustaining Treatment*, note 4, *supra*, at 171-196.

Cruzan, By Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988) *cert. granted, Cruzan by Cruzan v. Director, Missouri Dept. of Health*, ___ U.S.___, 109 S.Ct. 3240 (1989). Accordingly, the proper focus is not on the burdensomeness of life *per se* or on the inconvenience of life to the individual or to others. Were that the standard, as the Court acknowledged, persons with any of a variety of physical, mental, psychological or emotional handicaps or infirmities might find the state or others seeking to terminate their lives and the courts permitting them to do so. The fundamental interest of the state which forms the basis for decision making concerning the withholding or withdrawal of treatment must be blind to utilitarian notions of the relative ability of an individual to realize full human potential and/or the benefits that such individual's life offers to others in defining the value of the life protected by the state.

In addition to the Missouri Supreme Court, various other courts have recognized "sanctity of life" as the standard defining the state's legitimate interest. In *Matter of Conroy*, 98 N.J. 321, 486 A.2d 1209, 1223 (1985), for example, the Supreme Court of New Jersey described the state's interest as embracing not only an interest in preserving the life of the particular patient but an interest in preserving the sanctity of all life. Similarly, in *Superintendent of Belcher-Town State School v. Saikewicz*, 373 Mass. 728, 738, 370 N.E.2d 417, 424 (1977), the Supreme Judicial Court of Massachusetts firmly rejected any attempt to equate "the value of life with any measure of quality of life". *See also, Eichner v. Dillon*, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980), *modified and aff'd sub nom, In re Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E. 2d 64, *cert. denied* 454 U.S. 858 (1981) (In a proceeding involving possible withdrawal of respirator from patient in permanent vegetative state, principal state interest to be protected is preservation of sanctity

of life); *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986). (In case involving patient in persistent vegatative state, the Court stated: "... we make no judgment based on our own view of the value of Brophy's life, since we do not approve of an analysis of state interests which focuses on Brophy's quality of life").

Consistent with the foregoing case law, it is essential that the Court's legal analysis in this case and in similar cases in the future begin with the premise that the state has a paramount interest in preserving the sanctity of all life. Legally, this statement of the standard of the state's interest continues our historical tradition of the self-evident inviolability of human life.

Sanctity, while presumed by some to be only a religious term, is not a limited religious or sectarian term. As used by the courts, sanctity simply means that life is inviolable. Life is neither granted by the state nor are its goals defined, validated or circumscribed by the state. While the transcendent reality of life may have different meanings rooted in different religious or non-religious sources for different people, there is a common understanding that life has an origin, a purpose, an end, and a value which transcends the power of the state. The concept of the transcendental value of life is recognized in the adoption of the sanctity standard. This standard acknowledges that the authority over the origin and purpose of life is not exercised by the state. Indeed, it could not be a power of the state because our philosophy and form of government permits authority only over that expressly delegated to the State. The power over the origin and purpose of life is not so delegated and is, in fact, non-delegable. The Missouri, New Jersey and Massachusetts Courts cited earlier established sanctity of life as a standard and rejected

quality of life as a standard for determining the state's interest. This distinction is critical and necessary for the legal balancing of the state's interest so that persons with a variety of physical, mental, psychological or emotional handicaps or infirmities are protected from state approved devaluation by third parties.

In applying the sanctity of life standard, it must be remembered that death is a natural part of life. Sanctity of life is best protected in cessation of treatment situations when, within the consideration presented in Argument B, *supra*, the decision does not absolutize the maintenance of biological life regardless of other human values nor treat life as an instrumental value by disregarding the importance of physical life.

D. This Case does not Involve the Decision Making Rights of the Patient to Terminate Treatment Arising out of the United States Constitution but Involves Standards by Which the Immediate Family or a Guardian may Make Decisions With Respect to Withdrawal of Surgically Implanted Means of Nutrition and Hydration.

Earlier in this brief the *amici* identified the critical ethical issue in these cessation of treatment cases as the identification of the ethical considerations to be used in making the treatment decision and the identity of the decision maker.

The parties and other *amici* will undoubtedly address the legal source of the right to refuse or terminate treatment and whether such rights are transferrable. Because we are only stewards of life, exercising only limited dominion over it, the legal holding in this case should not confuse the qualified right to determine one's treatment found in the historical principles of the common law with the right to life involved in this case.

The basic question concerns the legal protection of the patient's interest in life when that person is in an irreversible state that prohibits his/her own self-determination. These *amici* would urge that the principles of guardianship law assist the legal analysis and promote the ethical principles of stewardship of life and the identity of family members or friends as the primary decision makers.

A guardianship is a trust relation of the most sacred character, in which the guardian acts for the ward, whom the law regards as incapable of managing his/her own affairs. This is a long established principle of law which was expressed, for example, in Kent's *Commentaries on American Law*, as follows:

> The guardian's trust is one of obligation and duty, and not of speculation and profit. He cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract, or purchase or sale, as to the subject of the trust . . . Those doctrines, undoubtedly, pervade the jurisprudence of every part of the United States. II Kent: *Commentaries on American Law* 187-8 (1826).

These principles extend to decisions over the person as well as the property of the incompetent person.

Reliance on the guardianship or fiduciary standards in factual situations such as the one involved here will permit the difficult issue of withdrawal of medical treatment to be resolved where it should be—that is, privately, locally, by family, close friends or guardians with the assistance of physicians, hospital ethicists, counselors and chaplains. The state probate or equity court must be available to hear occasional challenges to the decision making process or the motives of interested parties who are deciding to withdraw medical treatment. Such issues generally need not be resolved in court if decision making standards require the integration of the ethical considerations described above.

Various courts have looked to the principles of the law of guardianship as a norm for decision making with regard to the issue of whether life sustaining treatment of an incompetent patient may be withdrawn. In *Matter of Guardianship of Hamlin*, 102 Wash.2d 810, 689 P. 2d 1372 (1984), for example, the Supreme Court of Washington set forth a procedure to be followed in withdrawal-of-treatment cases involving incompetent patients based largely on guardianship principles. If the patient's immediate family, after consultation with the treating physician and consultants (described in the *Hamlin* case as a prognosis committee), agree that the patient's best interests would be advanced by withdrawal of the subject treatment, the family may refuse such treatment without seeking prior appointment of a guardian. Any disagreements among interested parties to the decision would require the appointment of a guardian and the dispute would be addressed to the probate or equity Court. *Id.* at p. 821, 689 P. 2d at 1378-1379.[18]

In the *Hamlin* case itself, the court upheld the trial court's decision authorizing the withdrawal of life-support systems from a patient in a persistent vegetative state with no prospect of regaining his cognitive functions. The Court, in interpreting Washington's guardian-

---

[18] As a general rule, courts appoint close relatives as guardians on the theory that they ordinarily will be the ones most solicitous of the incompetent's welfare. [see e.g. 65 A.L.R. 3d 991 (1973); Nev. Rev. Stat. §159.061 (Michie 1969); N.J. Stat. Ann. §3A:6-36 (West 1968)]. Most guardianship statutes expressly indicate a priority as between relatives, subject to the requirements described above.

ship statute, concluded that the guardian has the duty and, therefore, the power to act in the best interests of the ward, to assert the ward's rights and to participate in medical decisions:

> Just as medical intervention is, in the majority of cases, clearly in the best interests of the ward, nonintervention in some cases may be appropriate and, therefore, in the ward's best interest. We emphasize that these decisions must be made on a case-by-case basis with *particularized consideration of the best interests and rights of the specific individual*. We also stress the distinction between treatment which is expected to result in some measure of recovery and that which merely postpones death. (emphasis in original). *Hamlin, supra*, at 815, 689 P. 2d at 1375-76.

In developing the procedures outlined above, the Court noted that the principal function which the guardianship analysis serves is to protect against abuse by preventing "too precipitous a decision or the appointment of one with less than proper motives." *Hamlin, supra*, at 819, 689 P. 2d at 1377, quoting *In re Colyer*, 99 Wash.2d 114, 660 P. 2d 738 (1983). In not requiring the appointment of a guardian in cases where the immediate family and all other parties are in agreement, the court said it was convinced that "the remaining procedural safeguards surrounding this decision will adequately protect against abuse." *Id.* at 819, 689 P. 2d at 1377-8. The Court described such procedural safeguards as follows:

> First, this decision can be reached only after there is a medical diagnosis by the attending physicians that the incompetent patient is in (1) a persistent vegetative state with no reasonable chance of recovery and (2) the patient's life is being maintained by life support systems. Throughout this initial diagnosis process the treating physicians are under an ethical, moral and legal duty to treat the patient so as to advance his recovery and alleviate his suffering. Second, this initial diagnosis must be uanimously approved by the prognosis committee. *Hamlin, supra*, 689 P. 2d at 1378.

There is, accordingly, substantial legal support for the application of familiar guardianship principles[19], well established at common law and codified in state statutes, to resolve the issue of who will make decisions regarding the withdrawal of artificial treatment and what standards will be applied to the decision maker. Such an approach allows the primary social unit in our society, the family, to make such decisions, subject to the fiduciary obligations imposed on them. This approach is preferable to the endless litigation of such issues in the courts. Only those cases where the interested parties cannot agree require court decision.

E. The Court Should Enunciate Guidelines for Making the Decision and for Courts to Apply if the Parties are not Able to Agree on the Appropriateness of a Treatment Decision for a Person in a Persistent Vegetative State.

The primary right of the family is to be the decision maker without court intervention. If an incompetent person has not given any reliable indication of his/her

[19] *See e.g. John F. Kennedy Memorial Hosp., Inc., v. Bludworth*, 452 So.2d 921 (Fla. 1984); *Rasmussen By Mitchell v. Fleming*, 154 Ariz. 207, 741 P. 2d 674 (1987); *In re L.H.R.*, 253 Ga. 439, 321 S.E. 2d 716 (1984); *Conservatorship of Torres*, 357 N.W. 2d 332 (Minn. 1984); *Conservatorship of Drabek*; 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (1988) and *Severns v. Wilmington Medical Center, Inc.* 425 A.2d 156 (Del. Ch. 1980).

wishes, the decision maker should have the right to determine, within the framework discussed in Argument B of this brief the best interests of the patient. However, where a patient's views are known, weighty attention should be given to the expressed views of the patient which are temporarily and substantively relevant.

Because of the nature and importance of the issues involved in this case and cases like this, these *amici* urge that the Court adopt the highest possible civil standard of "clear and convincing" evidence for determining cessation of treatment cases. *See, e.g. Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 426 N.E. 2d 809 (1980). While the "beyond a reasonable doubt" standard is reserved for criminal cases, the burden normally used in civil matters of preponderance of the evidence is not adequate to protect the important interests at issue in a case such as this one.

In *Addington v. Texas*, 441 U.S. 418 (1979), for example, this Court held that a clear and convincing standard of proof is required by the Fourteenth Amendment Due Process clause in state civil commitment proceedings before an individual can be significantly deprived of his/her liberty. Accordingly, the Court held that the government in such proceedings must demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous. "To meet due process demands, the standard has to inform the fact-finder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases."[20] The Court stated that the task of defining the precise burden equal to or greater than the clear

[20] In so ruling, the Court also found the reasonable doubt standard inappropriate because "given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treat-

and convincing standard is a matter of state law to be left to the state courts. *Id.* at 433. *See also Santosky II v. Kramer*, 455 U.S. 745, 770 (1982) (Holding that clear and convincing proof was required in proceedings to terminate parent-child relationship).

If due process requires clear and convincing evidence as a prerequisite to depriving an individual of his/her liberty, then surely at a minimum such standard should be required in proceedings involving the issue of termination of treatment with the probability of ensuing death. As this Court has stated in explaining the need for clear and convincing evidence in certain proceedings, "rights once confirmed should not be lightly revoked." *Rivera v. Minnich*, 483 U.S. 574 (1987), quoting *Schneiderman v. United States*, 320 U.S. 118, 125 (1943). This is particularly true in a cessation of treatment case when the individual is unable to express his/her own wishes.

In the medical context, a clear and convincing standard would require evidence of the medical diagnosis and prognosis of the highest degree of certainty possible within the present medical standards based upon extended, corroborated and documented clinical observation supported by laboratory or other reliable diagnostic studies.

This same high degree of medical certainty must extend to the benefit/burden analysis and the finding that death will result from a pathology internal to the physiological system and that the withdrawal of the treatment allows the pathology to run its natural course.

Given the seriousness and complexity of the issues, the limited objective diagnostic tools and the inevitable

ment." *Addington, supra*, 441 U.S at 433. This reasoning is also appropriate in the medical context of cessation of treatment cases.

subjectivity that is inherent in the type of decision making process necessitated by the facts in this case and similar cessation of treatment cases, the Court should require cumulative findings of fact disallowing any one factor, be its consciousness, or otherwise, to control the decision. No diagnostic category alone and certainly no easy assumptions regarding the classification of a therapy as treatment or care should control the analysis. Rather, a total analysis of benefits and burdens of treatment to the patient is required.

These guidelines are appropriate for family decision makers as well as for the Court. They are necessary to preserve the sanctity of life and to assure the ethical qualities of these inherently complex and difficult decisions.

IV. CONCLUSION

The most basic right of any person is life. The most serious duty of the state is to protect that right. The legal standards and protections surrounding that right must be carefully constructed to harmonize ethical values with legal standards.

By requiring legal standards which protect the sanctity of life and by permitting families and friends to be the primary decision makers for their incompetent loved ones, this Court will protect that most basic right of all—the right to life as required by the Fourteenth Amendment.

Respectfully submitted,

By /s/ J. JEROME MANSMANN .....
J. Jerome Mansmann

By /s/ MELANIE DIPIETRO .....
Melanie DiPietro
Sandra L. Lannis